No. 80-251

IN THE

Supreme Court of the United States

October Term, 1980

BERNARD ROSTKER, Director of Selective Service,
Appellant,

v.

ROBERT L. GOLDBERG, et al.,
Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania

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FURTHER STATUTORY PROVISIONS INVOLVED[1]

The entire Military Selective Service Act ("MSSA"), 50 U. S. C. App. §§ 451-473, is reproduced in the Joint Documentary and Stipulated Record (R. 77-127). The principal provisions of the MSSA were summarized by Appellees at page 4 of the Motion To Affirm Judgment ("Motion To Affirm") filed herein, and will not be repeated here. Arguments made for the first time in the Brief For The Appellant ("App. Br.") require citation of the following additional provisions of the MSSA:

Section 4(a) of the MSSA, 50 U. S. C. App. § 454(a), provides, at ¶ 3 (not included in the portion of that section reproduced in App. Br. at 2-3), that the minimum standards for physical acceptability for induction in time of war or national emergency shall not be higher that those applied to persons inducted between the ages of 18 and 26 in January 1945. That same Section 4(a) provides at ¶ 6, also not included in the Brief For The Appellant, that every person conscripted into the Armed Forces shall be given full and adequate military training for a period of not less than twelve weeks before he is eligible for assignment in any foreign land.

COUNTER-STATEMENT OF THE CASE AND INTRODUCTORY STATEMENT

This case involves registration for a possible draft, not the draft itself. It presents the question of the constitutional validity of the categorical exclusion of all females from Selective Service registration. There is no factual record on, and the District Court did not consider, the constitutionality of excluding women from certain combat roles and that issue is not properly raised in this Court.[2] The District Court did not decide whether, in the

1. The Question Presented, List of Parties, Opinion Below, and Citation of Jurisdictional Provision in the Brief For The Appellant are adequate.

2. Throughout the Brief for the Appellant, the Government suggests that Appellees have conceded the legality of the so-called combat exclusion for women. Appellees do not concede the con-

event of a draft, men and women would have to be drafted in equal numbers, randomly, or in some particular ratio, or even if women would have to be drafted at all, and those issues, therefore, are not before this Court.

A comprehensive statement of facts and evidence and of the relevant military and Congressional history from the enactment of the MSSA in 1948 to the present has already been set forth in Appellees' Motion to Affirm at 4-18, 40-46, and will not be repeated here.

Appellant makes no attempt to rebut in his Brief the legal and factual points made in Appellees' Motion to Affirm. Appellant has instead shifted ground and raised entirely new arguments, distorting the record and the issues, and making incorrect and misleading factual assertions. First, Appellant has consistently, until now, recognized that the total exclusion of all women from, and the inclusion of all men in, Selective Service registration in Section 3 of the MSSA is a gender-based classification. In his Brief in this Court, Appellant argues for the first time that the classification at issue is between combat-eligible and combat-ineligible persons. This is factually incorrect. Men are registered regardless of their combat eligibility, solely because of their sex; women are not registered regardless of their combat eligibility, solely because of their sex. In fact, combat-ineligible men are frequently drafted,[3] and women are not ineligible for all combat roles.[4] Thus, sex is not a true proxy for combat eligibility, and combat

2. (Cont'd.)
stitutionality of the combat exclusion, but submit that it is irrelevant to a resolution of the present case. Appellees have consistently contended that male-only registration is unconstitutional even assuming limitations on women in combat. Appellees emphasize, as did the District Court, that the question of assignment limitations under any future hypothetical set of circumstances is irrelevant to the very different question of who should register today.

3. See Section I(A), *infra*, at 8-11.

4. See Section I(A), *infra*, at 11-13.

eligibility is not a prerequisite to registration or conscription for males.

Second, Appellant now argues that the MSSA was in effect re-enacted in 1980.[5] Appellant has consistently failed to address the legislative history of the MSSA from 1948 to the present, and now looks for support to certain litigation-inspired and post-litigation statements accompanying funding legislation. Congressional commentary in 1980 is uninformative with regard to Congressional intent in enacting the MSSA in 1948 and in amending it thereafter.[6] *International Brotherhood of Teamsters v. United States,* 431 U. S. 324, 354, n. 39 (1977).

In sum, the Brief for Appellant literally redefines the case. Therefore, Appellees will respond to the new arguments, legal and factual, raised by Appellant for the first time in this Court and respectfully incorporate herein and refer the Court to the Motion to Affirm for full discussion of those issues raised and litigated prior to the submission of the Brief for the Appellants.

SUMMARY OF ARGUMENT

Goldberg v. Rostker[7] was tried by all parties as a gender discrimination case. For nearly a decade all parties acknowledged what is self-evident, that the requirement of Section 3 of the MSSA that all males and no

5. App. Br. at 28, n. 25.

6. In the FY 1981 Defense Authorization Bill, Congress simply appropriated funds—but did not re-enact the MSSA. Any consideration of the registration of women was undertaken solely for the litigation-inspired purpose of *post-hoc* rationalization. See, Section II(D), *infra.* The focus of H. R. J. Res. 521 was the emergency funding of a "vitally necessary" (App. Br. at 5) registration plan which, under existing law, excluded women. Extensive legislative history reveals that, at the time of the passage of the MSSA, the basis for excluding women from conscription was a sex-stereotypical view of their proper role minding home and hearth. *See,* Motion to Affirm at 4-6, and not an analysis of their ability to serve in the military. Jur. St. 23a, n. 15.

7. Civil Action No. 71-1480 (E. D. Pa.).

females register for possible conscription is a classification based upon sex. On appeal Appellant urges that, notwithstanding his prior position, there is another, unspoken basis of classification—combat eligibility.

The Record is clear, however, that the registration provision of the MSSA does *not* classify by combat eligibility. Thousands of combat-ineligible males are registered and, even more so in war than in peace, may be conscripted into the Armed Forces.[8] At the same time, volunteer servicewomen who meet the medical qualifications for their Military Occupational Specialties ("MOS") have been and increasingly are accepted into positions which have traditionally been thought of as combat roles.[9]

There are no statutory prohibitions upon assignment of women to combat duty in the Army, and only incidental restrictions in the other Services. Limitations upon assignment are, and would be for most draftees, entirely a matter of Service policy—which Appellant admits is flexible. A statutory bar on female registration cannot be justified as a short-hand way of excluding women from combat assignments, for which men are sometimes ineligible and women are sometimes eligible; nor can it be said accurately to reflect existing statutory or policy restrictions on female assignments.

Appellant asserts a non-gender-based classification in order to avoid scrutiny of male-only registration under the standard enunciated in *Craig v. Boren*, 429 U. S. 190

8. In wartime, the general standard of fitness for conscription must, by statute, drop below combat fitness. MSSA, 4(a), 50 U. S. C. App. § 454(a). Doctors and other medical professionals are subject to induction, in war or peace, without regard to fitness for combat, and, of course, are ineligible to fight by virtue of their assignment as doctors, corpsmen, and the like. Conscientious objectors who decline only combat roles (Class I-A-O) are similarly draft-eligible, but combat-ineligible.

9. *E.g.*, Lance and Pershing Missile Crews. American Servicewomen have for years earned hostile fire/combat pay and combat awards in their duty assignments. Section I(A)(2), *infra*; J. A. 186(5).

(1976), and similar precedents. Those cases impose on the Government the burden of demonstrating a close and substantial relationship between the gender classification and an important purpose actually contemplated by the statute. The District Court found that the classification contained in registration under Section 3 was indisputably gender-based, and thus held that *Craig* was controlling. Appellant has offered no evidence which could justify overturning that finding as doubtful, much less "clearly erroneous." *United States v. General Dynamics Corp.*, 415 U. S. 486, 508 (1974).

Appellant's claim that a lesser, more deferential standard of review should be applied in this case because of its tangential military character is likewise unpersuasive and unsupportable. This Court has consistently rejected the argument that legislation enacted under the power to raise armies or other war-power-related clauses is subject to lesser Equal Protection scrutiny than other laws, and the decisions according military authorities unusually wide latitude over matters of internal military regulation and governance are clearly inapposite.

Appellant places his principal reliance on findings generated by the Senate Subcommittee on Manpower and Personnel in April of 1980, since prior history is so "totally unhelpful in defense of male-only registration." J. A. 220. Although those findings were irrelevant to the F. Y. 1981 Defense Authorization Bill, S 2294, by June, they were urged by the Senate conferees on S 2294 and ultimately adopted by the House and Senate conferees in August 1980.[10] In arguing that S 2294, enacted as P. L. 96-342, is a "reconsideration and reenactment" (App. Br. at 28, n. 25) of Section 3's all-male registration provision, the Government ignores the rule that substantive law is neither repealed nor amended by committee reports or by

10. By which time, this case was already on appeal to this Court and the issue of female registration was no longer before Congress.

general funding legislation. *TVA v. Hill*, 437 U. S. 153, 190-193 (1978).[11]

Appellant argues that there is no military necessity to draft women; we can defend the country with a male-only draft. That rationale misses the mark in two ways. First, discrimination may not be justified by demonstrating that *non-discrimination* is unnecessary to the statutory purpose. The burden is on the government to establish a close and substantial relationship between discrimination and the statute's legitimate and articulated goal. Second, the military utility of *registering* women for the Nation's inventory of potential military personnel and skills, and for possible use in any contingency, is not negated by demonstrating that some hypothetical situations could be handled with a male-only *conscription*.[12]

In short, Appellant has presented nothing in or out of the Record which would support overturning the judgment of the District Court in this case.

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11. If anything, the District Court granted excessive deference to this post-hoc, post-litigation Congressional history in requiring plaintiffs to produce "overwhelming evidence" to rebut those belated findings. Jur. St. 20a.

12. In fact, even under the only concrete hypothetical considered in the Brief For The Appellant, current Defense Department plans call for women, including female draftees if available, to play an integral and vital role in the Nation's defense. Section II(A), *infra*.

Until submission of the Brief For The Appellant, male-only registration had been defended in this case primarily as enhancing "military flexibility." Jur. St. 28a-43a. That argument was refuted in the Motion To Affirm at 39-46. Unable to deal with the fact that every member of the Joint Chiefs of Staff testified *in favor* of registering women for strictly military reasons, Appellant has culled, mostly from Congressional transcripts, a few references to testimony of military leaders purportedly supporting Appellant's position. What is most striking about the new citations is that *every one* of those witnesses testified in *favor* of, or worked to implement, the registration of women under the MSSA. See Section II(C), *infra*.

ARGUMENT

I. All-Male Registration Under the MSSA Is Properly Subject to the Intermediate Tier of Scrutiny.

A. Section 3 of the MSSA Is a Purely Gender-Based Classification.

This is a sex-discrimination case. The Government admitted that in its Answer to Complaint[13] and proceeded on that basis through trial.[14] That concession was duly noted by the District Court. Jr. St., 12a, 43a. Appellant now argues in this Court that Section 3, which requires *all* males and *no* females to register for military service, has for 32 years been a carefully considered—but unarticulated—classification between the combat-eligible and the combat-ineligible.[15] Appellant's new assertion that gender is dispositive of all questions of combat eligibility and that the classification is based not on gender but on eligibility for combat is factually indefensible. See, *infra*, at 8-13. But even if there were a closer correspondence between sex and combat eligibility, that correspondence would be relevant only to the proffered *justification* of the classification, not to a determination of the appropriate standard of review. Adoption of Appellant's position would effectively eliminate intermediate scrutiny for explicitly gender-based classifications in all cases where the Government could assert any minimally rational basis, no matter

13. R. 13, filed on July 31, 1974.

14. *See* Defendants' Reply Brief on Burden of Proof, at 2 (June 24, 1980) ("It is not disputed that Section 453 contains a gender-based classification."). At trial, counsel for defendants stated, "Undoubtedly the Military Selective Service Act creates a gender-based distinction because males but not females are subject to registration and conscription thereunder." Trial Transcript, July 1, 1980, at 68. *See* also, *Id.*, at 70.

15. App. Br. at 11, 21-26.

how stereotypical or overly generalized, other than sex itself for the classification.[16]

1. Men Are Not Inducted or Rejected for Induction Based Upon Combat Fitness; Nor Are Women Uniformly Prohibited From Combat.

Appellant incorrectly asserts that only males fit for combat may be inducted, and that those who are unfit join the unregistered women as draft-ineligible.[17] That assertion is an *ipse dixit*, offered without support. Actually, by statute, men may be inducted in time of war or national emergency even though they are not "combat fit", so long as they are "expected to be productive in the military establishment". Army Regulation 40-501 ("AR 40-501"), Medical Services, Standards of Medical Fitness, Sec. 1-2(e).[18] Further, male doctors and male nurses may be inducted in war and peace alike without regard to combat fitness, so long as they may be expected to perform in their specialty. AR 40-501, Ch. 8-3.[19] Similarly situated women have never been drafted, and, as long as they are not registered, cannot be drafted. Although women have tradi-

16. For example, the Appellant's most recent analysis would have changed *Craig v. Boren* into a case where a statute which separated males from females would have to be scrutinized as one differentiating merely between high-risk and low-risk drivers, because there was some correlation between gender and drunk driving arrests. 429 U. S at 199-204.

17. App. Br. at 23.

18. AR 40-501 was not introduced at trial because it was not relevant to any justification for male-only registration offered at that time. For the convenience of the Court, Appellees file herewith one copy thereof, as amended through September 15, 1980.

19. "Allied Medical Specialists" is a broad term, including not only doctors, but, e.g., *registered nurses*. 32 CFR § 1622.15 (R. 151). There is considerable irony, and unfairness, in a system under which male nurses are conscripted as privates, while female nurses enter service voluntarily and then only as officers.

tionally dominated the nursing field, and now constitute a substantial proportion of our young doctors, even the "doctors draft" was for men only.[20] Moreover, as Appellant concedes, conscientious objectors not opposed to non-combat service illustrate yet another example of a substantial group of men who are ineligible for combat, but who are nonetheless registered and inducted by the thousands in wartime while similarly situated women are not.[21]

The heart of Appellant's argument is the assertion that:

> "[W]omen—like the substantial percentage of men who are ineligible for combat assignment and are released from draft obligations at the classification stage—are excluded from the draft pool on the basis of the statutory disability imposed on the female sex". App. Br., at 23.

The Government puts its case more graphically in a footnote:

> "[T]hose men who are ineligible for combat assignment—including not only the 'halt' and the 'blind,' as appellees put it (*id.* at 46), but the flatfooted as well—ultimately are stricken from the induction rolls through the classification process. All persons ineligible for combat—male and female—are thus

20. Both the statutory power to induct (except for those previously deferred) and authorization for a separate "doctors draft" lapsed in 1973. Present regulations continue to provide for the deferred classification of medical professionals in Classes I-AM and I-AOM. 32 CFR §§ 1622.15, 1622.17, (R. 151). A doctors' draft could be reinstituted by the same legislation which would authorize the induction of registrants generally. Appellee Goldberg is a physician who has never been subject to conscription and would be subject to a "doctors draft".

21. App. Br., at 23, n. 22. *See* also, Bureau of the Census, Department of Commerce, *Statistical Abstract of the United States*, 1978, No. 613; 1976, No. 542 (R. 1805).

equally excused from 'conscription into the Armed Forces.'" *Id.*, at n. 22.

The argument is factually false as to both men and women since, in time of war or national emergency, the physical standard for induction *drops* from "combat fit"[22] to "expected to be productive in the military establishment"[23] as a matter of direct statutory requirement.[24] Chapter 6 of AR 40-501 governs inductibility in mobilization,[25] and Appellant's statement that "the flatfooted as well [are] ultimately stricken from the induction rolls," App. Br. 23, n. 22, is exposed thereby as fantasy.[26] In wartime, the flatfooted *are* inductible, and they are inducted despite the fact that they are *not* combat-eligible. As one's medical rating falls, one becomes unacceptable for combat, but still acceptable for a diminishing set of non-combat duties until, finally, one is unacceptable for service at all.[27] Combat fitness does not mean availability

22. AR 40-501, Sec. 9-5 (Chart, Code B).

23. AR 40-501, Sec. 1-2(e). At the same time, AR 611-201 which sets medical standards for assignments, does not reduce the guideline for wartime assignment to the combat positions currently closed to women.

24. Section 4(a) of the MSSA requires that, in time of war or national emergency, "minimum standards of physical acceptability . . . shall not be higher than those applied . . . in January 1945".

25. The only time there will be inductions under the present registration.

26. The defects of the lower extremities which disqualify a man for service under Section 6-11 of AR 40-501 are double amputation, loss of toes rendering the individual "unable to perform useful military service", certain conditions of the feet (not including flatness) "which would prevent the wearing of a military shoe", and internal derangement of the knee "so disabling as to prevent gainful civilian endeavor".

27. Deposition of Major General R. Dean Tice, at 26 (R. 1653). Deputy Assistant Secretary of Defense General Tice described the six-part "PULHES" medical rating system at R. 1650-53.

for transfer to any combat position. It only means qualification for *some* combat positions. Even in peacetime, not every male inductee is eligible for duty as an infantryman.[28] Combat unfit or ineligible simply does not mean draft-exempt.

Appellant's proclaimed "statutory inability of women to be assigned combat positions," App. Br., at 21, is similarly unrelated to reality.[29]

Statutorily, both sexes are equally fit for combat in the Army. For the Army, which typically makes the greatest use of draftees in wartime, Congress abolished all statutory restrictions on assignments for women in 1978. 92 Stat. 1627, repealing 10 U. S. C. § 3071. Jur. St., at 38a, n. 28. The only remaining assignment restrictions by gender in the Army are matters of Army policy and relate only to "close combat" positions—meaning certain positions in those maneuver battalions whose mission is to close with and destroy enemy units. Statement of Assistant Secretary of Defense Robert Pirie, J. A. 210;

28. A current copy of AR 611-201, which lists the specified PULHES Physical Profile for each Military Occupational Specialty (MOS) as part of the description of each MOS, is submitted herewith for the convenience of the Court.

In time of war, test score levels down to "3" (*i.e.*, unfit for combat) are acceptable for induction. See AR 40-501, Ch. 6, 9, esp. §§ 9-3 and 9-7. In peacetime a PULHES profile of all "2's" or better is required for induction. Some combat positions, such as Pershing Missile Crew Member (MOS 15E) permit scores of "2" in all categories other than the Psychiatric. AR 611-201, at 3-13-19. Thus a profile with no score below "2" is rated "combat fit". However, such combat fitness *does not* mean availability for transfer into the most common close combat position, the infantryman (MOS 11B). For most close combat billets, such as infantryman, only scores of "1" on every PULHES factor meet Army qualification standards. AR 611-201, at 3-11-6.

29. Despite his contrary assertion, Appellant concedes the point by admitting that there are no statutory gender restrictions applicable to combat positions in the Army, and few elsewhere, App. Br., at 22. *See,* Motion To Affirm at 14-15.

Decision Memorandum: Subject: Combat Exclusion Definition for Women, J. A. 185-187.[30] Women must pass the same physical examination as do men, in war or in peace, to enter the Armed Forces. AR 40-501, Chapters 2, 6. Thus, medically, both sexes are equally fit for combat in all Services. Secretary Brown described the Army situation in 1978 as follows:

> "In the Army, women are now assigned to all units except infantry, armor, cannon field artillery, combat engineers, and low altitude air defense artillery units of battalion/squadron size or smaller and in all military occupational specialties except those concentrated in such units. For example, women are assigned to combat support and combat services support units in divisions, including maintenance battalions, communications battalions, brigade level headquarters, and certain artillery units." J. A. 175.[31]

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30. As Army Chief of Staff General Rogers advised all units on March 3, 1978:

> "Qualified women now have the opportunity to serve in all but a few specific combat units and combat specialties. In availing themselves of that opportunity women, like their male counterparts, must accept the responsibility for sharing all risks and enduring all hardships inherent in their specialty . . . Women are an essential part of the force. They will serve in the skills in which they have been trained." J. A. 173.

31. Secretary Brown testified to Congress on April 1, 1979 that "if men are registered, women ought to be too," with any decision as to conscription abiding the uncertain circumstances of that event. J. A. 181-82.

He had previously informed Congress that:

> "A servicemember in combat is authorized to receive combat/hostile fire pay and earn combat awards. Women have received hostile fire pay and combat awards in past conflicts. Women have served in combat in many skills during World War II, Korea, and Vietnam. Army nurses have served in combat for over a hundred years, although they and other medical personnel are considered noncombatants. Since the word 'combat' has historically been used to include such a

It is clear, then, (1) that combat ineligible men are not draft-exempt and (2) that women are not and have not been categorically excluded from all combat. *See* also, Motion to Affirm at 14; Statement of Harrison Wellford, et al., March 19, 1980. J. A. 206, at 207. The purported equivalence of male/female with combat-eligible/combat-ineligible is unproven because it is untenable.

2. That Women May Be Ineligible to Serve in Some Combat or Combat-Related Positions Might Be Offered to Satisfy—But Cannot Be Adduced to Avoid—Intermediate Scrutiny of Male-Only Draft Registration.

Section 3 of the MSSA is explicitly and without exception classification by gender, and it distributes the benefits and burdens of registration and conscription strictly by sex. This Court has declined to apply intermediate scrutiny to classifications that have a differential impact as between men and women, and are based on characteristics positively correlated with gender, *only* where such classifications neither rely *expressly* on gender, nor operate to distribute benefits and burdens *solely* on the basis of gender. *See Personnel Administrator of Massachusetts v. Feeney,* 442 U. S. 256 (1979) (state law limiting benefits to veterans not subject to intermediate scrutiny; gender not the criterion, and denial of benefits to *non-veterans* left out many men as well as nearly all women);[32] *Geduldig v.*

31. (Cont'd.)

broad range of activities, the Department of Defense does not believe that the term provides a useful basis for expanding the opportunities for women in the service." J. A. 174.

32. Male-only registration harms the exempted women as well as the registered men. *Feeney* illustrates the lifelong loss of opportunity suffered by the vast majority of women as a result of their exclusion from registration for the draft. A substantial proportion of the men benefitting from veteran's preferences were draftees; only the few women permitted to volunteer accrued similar benefits.

Aiello, 417 U. S. 484 (1974) (state disability insurance program excluding *pregnancy* from conditions covered not subject to intermediate scrutiny; gender not the criterion, and group disadvantaged does not include *all* women, while group benefited includes women as well as men). The initial male/female dichotomy of treatment in the statutes challenged in *Schlesinger v. Ballard,* 419 U. S. 498 (1975), did not apply where the sexes enjoyed equal opportunities for assignments. 419 U. S. at 509. The male-only draft registration provisions of the MSSA, by contrast, *automatically* exempt *all* persons of one gender, and *none* of the other, from a burdensome requirement or legal disability, even where men and women are similarly situated, *i.e.,* some of both are combat-ineligible and some are combat-eligible, but most of both are useful in achieving "an adequate armed strength"—the purpose stated in Section 1(b) of the MSSA.

This Court has never considered such a statute, which expressly classified on the basis of sex, as anything but a gender-based classification; it should not do so for the first time here.

Appellant argues that this Court should apply only the most minimal scrutiny to the MSSA's male-only draft registration provisions "because the challenged classification is based on women's unchallenged ineligibility to be utilized in combat, and not on gender alone." App. Br. at 21. Even assuming *arguendo* women's "ineligibility to be utilized in combat", a point which Appellees indeed challenge, pp. 11-13, *supra,* and Appellant himself refutes, App. Br. at 22, and n. 19, what Appellant invites the Court to do here would be unprecedented and unjustified. This Court has never avoided applying intermediate scrutiny to an absolute gender-based classification merely because the challenged classification *also* tracks some facially gender-neutral characteristic—in this case, allegedly, combat ineligibility. That more combat and combat-related positions may be open to men than to women might be advanced to *justify* male-only draft registration under in-

termediate scrutiny, but that difference in eligibility has utterly no bearing on the level of scrutiny to be applied to the classification.

Consideration of a condition other than gender which correlates identically with gender—a condition that might plausibly explain, and ultimately justify, a classification's explicit reliance on gender—has always been a part of the *process* of intermediate scrutiny. Identification of such a condition is not, and should not become, a means of avoiding such scrutiny. That a gender classification may to some degree reflect social, economic, or legal circumstances did not escape this Court's notice in *Reed v. Reed,* 404 U. S. 71 (1971), (more men than women may be financially sophisticated); *Stanton v. Stanton,* 421 U. S. 7, 14 (1975) (gender correlated with need for education and training); *Craig v. Boren,* 429 U. S. at 199-204 (1976) (gender correlated with drunk driving); or *Orr v. Orr,* 440 U. S. 268, 280-81 (1979) (gender correlated with need). But such correlations between gender and *other* human conditions, although perhaps making the line between men and women minimally "rational" in each of those cases, were held to be insufficient to render any of those classifications "substantially related to an important government interest," *Craig, supra,* 429 U. S. at 197—and were *certainly* insufficient to obviate the need to demonstrate that substantial relationship.[33]

Were the Court to accept Appellant's invitation, intermediate scrutiny would be applied only in cases where nothing *but* gender could be advanced to justify a chal-

33. The nature and extent of the correlation between gender and some other condition might on occasion enable gender to *satisfy* the demands of intermediate scrutiny. *Semble, Dothard v. Rawlinson,* 433 U. S. 321, 32-37 (1977) (gender as possible bona fide statutory job qualification under equal employment statute; no constitutional point considered). But using such a correlation to satisfy intermediate scrutiny after a searching analysis is a far cry from deploying it at the threshold to *avoid* such scrutiny altogether. *See,* App. Br. at 21-26.

lenged classification by sex. But those few cases are the very ones in which not even a test of minimal rationality would be met. Intermediate scrutiny, developed and applied by this Court in a long line of decisions, would be relegated to those cases in which it would be unnecessary to the result. Whenever gender was argued to stand as a surrogate for any other trait, we would retreat to minimal scrutiny, overruling a decade of decisions in the process. Gender classifications should be reviewed as such, and made to stand or fall on the closeness and substantiality of the relationship between such discriminations and an important statutory purpose.

B. That This Case Involves a Challenge to the Exclusion of Women From Registration Does Not Justify a Lower Standard of Review.

Appellant has argued that, because this case arises in a military context, the gender-based classification in question should be measured under a lower standard of review than the heightened scrutiny normally accorded to gender-based classifications. There is no basis for any such lowering of the standard of review applicable to gender-based Equal Protection cases.

1. There Is No Military Exception to the Standard of Review Otherwise Applicable in Cases of Explicit Gender-Based Classifications.

(a) There Is No Exception to the Relevant Standard of Review Based Upon the Source of Legislative Power.

This Court has never related the standard of review in an Equal Protection case to the clause of the Constitution pursuant to which a challenged statute was enacted. To the contrary, this Court has consistently stressed the dangers of granting undue deference to legislation simply because it was based on the national defense clauses of Article I, Section 8. Since at least 1866, and

consistently with respect to virtually every national crisis since the Civil War,[34] this Court has recognized that:

> "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. 'Even the war power does not remove constitutional limitations safeguarding essential liberties.' *Home Bldg. & Loan Association v. Blaisdell,* 290 U. S. 398, 426, 78 L. Ed. 413, 422, 54 S. Ct. 231, 89 ALR 481 (1934)."

United States v. Robel, 398 U. S. at 263-64.

Adoption of Appellant's position would result in a dangerous and open-ended precedent.[35] If the power to raise armies or to wage war justifies a lower standard of review for gender classifications it would justify a lower standard for racial classifications as well. Even a registration law excluding blacks might be permissible on the ground that minorities are already over-represented in the armed forces, thus making it unnecessary to draft them and "rational" not to. Similarly, a legislative mandate or authorization to re-segregate units in the Armed Forces

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34. *E.g., Ex Parte Milligan,* 71 U. S. 125 (1866); *Hamilton v. Kentucky Distilleries and Warehouse Company,* 251 U. S. 146, 156 (1919) (Brandeis, J., for a unanimous Court), ("The War power, like other powers and like the police power of the states, is subject to applicable constitutional limitations."); *United States v. Cohen Grocery Co.,* 255 U. S. 81, 88-9 (1921); *Youngstown Sheet & Tube Company v. Sawyer,* 343 U. S. 579, 587 (1952); *United States v. Robel,* 398 U. S. 258 (1967).

35. The District Court noted:

> "It would be an incorrect and dangerous concept for the judiciary to apply a less stringent test to possible constitutional violations committed by the Congress or the executive in exercising war powers. That power is precisely the power which historically can infringe most substantially on the civil rights of citizens and therefore may be the one most in need of an appropriate check and balance." Jur. St. 19a.

might pass muster as a "rational" response to racial incidents in integrated units. The history of Due Process/Equal Protection cases in this Court precludes any such reliance on mere rationality. Indeed, the "strict scrutiny" of racial classifications was first enunciated in a war powers case, *Korematsu v. United States*, 323 U. S. 214, 216 (1944).[36]

(b) There Is No Exception to the Relevant Standard of Review Based Upon the Impact of the Classification on the Military.

Just as the source of legislative authority does not affect the standard of review, this Court has never ruled that the standard of review accorded to a gender-based classification will be lowered because a challenged classification has an impact on the military. As discussed more fully in Appellees' Motion to Affirm at 23-32, Appellant's reliance on *Schlesinger v. Ballard* to establish the contrary is entirely misplaced and is totally undermined by *Frontiero v. Richardson*, 411 U. S. 677 (1973).

2. Any Exception to the Relevant Standard of Review for Classifications Directly and Substantially Affecting the Internal Operations of the Military Would Not Affect This Case.

Even if classifications which affect only military personnel and which govern important internal operations of the military could plausibly be judged by a more lenient standard than all other gender-discriminations, male-only registration under the MSSA could not thereby be saved

36. The Government argued in *Korematsu* not only that the exercise of the war powers was reasonable but that the classification was not actually based on race, but "other considerations 'making' the ethnic factor relevant" (Brief of Appellee, United States, p. 26). The argument that the instant case does not involve the gender line clear from the face of the statute thus has a history of rejection in this Court.

from heightened scrutiny. Persons called upon to register are, by definition, civilians. It is no mere technicality that the Selective Service System is not part of the Department of Defense, MSSA, § 10, 50 U. S. C. App. ¶ 460, and that its funds are appropriated directly to it as an independent agency. Selective Service regulates the conduct of the civilian population, not of military personnel. Even the *impact* of registration on the military is only indirect and attenuated: Selective Service merely creates the pool of those who are available to serve, a pool from which the military specifies quotas of conscripts according to its needs. Ultimately, it is the military services which decide in what capacity draftees will serve.

Finally, as the Motion to Affirm explains, at 32-34, the cases cited by Appellant involving the relaxed scrutiny of First Amendment claims by persons in the military or on military bases are clearly inapposite—not simply because none are Equal Protection cases, but, most crucially, because all involve matters *internal* to the military.

Thus, even if this Court were suddenly to overrule *Frontiero* and radically alter *Schlesinger* by lowering the equal protection standard applied *within* the military, such a ruling would still be inapplicable to this challenge to a law which operates only on members of the civilian population.

II. Male-Only Registration Is Not Substantially Related to Any Important Governmental Interest

A. Whether An All-Male System Could Meet Military Needs Is Irrelevant.

Appellant defends Section 3 of the MSSA on the grounds that there is no present military need to draft, and hence to register, women. App. Br., at 27, 31-34. However, as the Department of Justice informed Congress:

> "the question of military necessity for drafting women is irrelevant to the Constitutional issue." Testimony

of Deputy Assistant General Lawrence Sims, March 19, 1980 (R. 920-21).

Senator Cohen, dissenting from the rejection by the Subcommittee of S 2440, the proposed amendment to the MSSA which would have permitted female registration, stated two pertinent questions:

> "No one who has addressed the issue of constitutionality has adequately addressed the following question: If the Department of Defense states it can accept 250,000 women by 1985, if mobilization occurs at that time, and if we have an insufficient number of women volunteers for those positions, what is the rational basis for drafting men for those noncombat positions?" R. 885, reprinted at S. Rep. 96-826, at 242.
>
> "The question should be why women should not be registered, rather than why they should be. The burden of proof falls on those who would exclude women from this obligation. No convincing case for such exclusion has been made thus far." R. 886, reprinted at S. Rep. 96-826, at 242.

It is not Appellees' burden to prove that registering or drafting women is necessary to the proper function of the MSSA. If that were Appellees' burden, all prior Equal Protection decisions of this Court would be brought into question; in each the challenging party would have to show that *elimination* of the offending classification was necessary to an important governmental interest. The imposition of such a burden goes far beyond even a "rational basis" test and would endow even facially discriminatory legislation with a nearly irrebuttable presumption of validity. Whether or not an all-male (or all white or all black) pool of registrants or stream of inductees would be sufficient to meet military needs is constitutionally irrelevant. The burden must be on the Government [37]

37. Wengler v. Druggists Mut. Ins. Co., 100 S. Ct. 1540, 1546 (1980).

to demonstrate "an exceedingly persuasive justification to withstand a constitutional challenge." *Personnel Adm'r v. Feeney,* 442 U. S. at 273. It was for Appellant to prove at trial that the *exclusion* of women from the pool of persons potentially available for conscription under any circumstances—i.e., registrants—is closely and substantially related to the achievement of the purposes of the MSSA. MSSA, §§ 1(b), (c). This Appellant did not and could not prove.

As is demonstrated in greater detail at Section II(C), *infra,* the most effective possible mobilization, *even in the only hypothetical scenario considered by Appellant,* would be enhanced by the availability of women in the registration pool. A sudden, all-out war in Europe between NATO and the Warsaw Pact nations could well be as destructive and intense as Appellant suggests. App. Br. at 30. Conceivably, such a war could be decided within a matter of weeks or even days. In that worst-case scenario, the only case suggested in Appellant's Brief, the war could be decided *before the first draftee reached the front* because even with peacetime registration, no draftee could arrive in Europe until approximately the 110th day after mobilization. Hearings on FY 1981 Defense Authorization Bill, S 2294, at 1824, 1838 (Testimony of General Meyer). Section 4(a) of the MSSA requires, without exception, that every draftee "shall, following his induction, be given full and adequate military training for service in the armed force into which he is inducted for a period of not less than twelve weeks" before he may be assigned for duty in any foreign country.

Who, then, would fight in such a hypothetical war? Assistant Secretary of Defense Robert B. Pirie testified that to meet a substantial shortage of combat troops in the Reserves, the support units in the United States would have to be "stripped down" to provide individuals already in the military as combat fillers; but to mobilize, train and equip an expanding force requires *supplementing* those

very support units.[38] The availability of women who would not require twelve weeks of training because they were not going overseas, "to fill those TDAs [service support units] spots [would] enhance the capability of the military to perform its function."[39] Because many of the skills required in those administrative, clerical, training and supply units would be skills already more concentrated in the female population than in the male, women could most efficiently be placed directly in the support units, thus freeing males for transfer.[40]

Appellant bore the burden to prove that registration of women would impede the accomplishment of the purposes of the MSSA. Yet the testimony of then Army Chief

38. Deposition of Robert B. Pirie, J. A. 266, 272-73.

39. *Id.*, J. A. 274.

40. As Assistant Secretary Pirie testified to Congress:

"The problem with the drafted man is that it takes twelve weeks of training to make that man employable. However, a woman who is drafted would require little, if any, training to move into a noncombat job to release a man who had previous training who was immediately deployable.

". . . it might take time to train a man whereas if you had a woman already trained in that noncombat skill that would be a plus". Testimony before the House Subcommittee on Military Personnel, March 5, 1980. J. A. 213, 240.

The District Court relied upon this testimony, in assessing the proffered justification of military flexibility and in describing actual plans for coping with the contingency of a European war. Jur. St., 32a-37a. Nor is any "special skills" draft needed to validate the District Court's reasoning. The skills available among inductees are examined and assignments made with those available skills and the needs of the military for those skills in mind. Hearings on S 2294, at 1684.

It is unfortunately true that societal pressures, including employment discrimination, have resulted in a situation where women, as a class, may be turned to for entry into clerical, administrative and similar support positions more quickly, and with less training, than men, as a class.

of Staff General Rogers typified the Record at trial and before Congress:

> "Women should be required to register in order for us to have an inventory of what the available strength is within the military qualified pool in this country." S. Rep. No. 96-226 (1979), at 14.

Appellant simply failed to prove that all-male registration is closely linked to the accomplishment of any purpose of the MSSA.

B. Whether Women Could Constitutionally Be Excluded From Various Conceivable Drafts or Combat Roles Is Immaterial.

Appellant concedes that, but for the *possibility* of ultimate conscription, military registration would itself be a pointless and hence unconstitutional deprivation of liberty. App. Br. at 26. And, but for the *possibility* of war, military conscription too would no doubt be unconstitutional. Only the omnipresent danger of war could justify the use of such drastic coercion in times of peace. But it will not do to run this logical sequence in reverse, as the Government seeks to do when it attempts to *reduce* the constitutionality of an all-male registration requirement to the validity of a hypothetical program for conscripting men only—and of doing so in circumstances where, by the Government's hypothesis, all conscripts are in turn assigned either by those specific combat posts presently closed to women or to posts in such continual rotation [41] with the latter that including anyone who would be in-

41. Appellant's "continual rotation" argument, if accepted, would justify excluding even *volunteer* women from the services. But both Congress and the military encouraged women to volunteer. If the presence of a volunteer woman who would not be rotated to a combat position will not destroy military flexibility, it is hard to understand how the presence of the same woman, in the same job—but as a draftee—would impair flexibility.

eligible for those posts would seriously impede needed military flexibility. *See,* App. Br. at 27-28.

If it could indeed be *guaranteed in advance* that conscription would be re-imposed by Congress *only* in circumstances where, and in a form under which, conscripts would all have to be trained for and assigned to special combat positions from which all women were categorically and justifiably [42] excluded, then it could at least be arguable that the registration of women would be a pointless imposition.[43] But no such thing *can* be guaranteed in advance. On the contrary, Appellant's concession that even in the European war scenario, only "approximately two-thirds of the demand on the induction system would be for combat skills," App. Br. at 29, means that at least one-third of the conscripts would be assigned to the positions admittedly open to women. Indeed, draftees have traditionally staffed non-combat, as well as combat, positions even in wartime. Jur. St. 33a; Hearings on S 2294, at 1834. In 1980, Army Chief of Staff General E. C. Meyer wrote to Congress complaining of "the already seriously understructured combat service support area." S. Rep. 96-826, at 227.[44]

42. Whether there could be *any* such circumstances and positions is not at issue in this case. *See,* n. 2, *supra.*

43. Even on that unlikely hypothesis, however, the registration of *all* men, rather than of only such men as could ultimately qualify for the hypothetical male-only combat posts, would impose on those men who could *not* ultimately qualify burdens both gratuitous and discriminatory because women identically situated would be spared such intrusion. It would be no answer in such a situation to say that it is "most *efficient* to presume all males combat-capable" at registration. Brief of Appellant at 23, n. 22 (emphasis added). *Reed v. Reed,* 404 U. S. at 76; *Stanley v. Illinois,* 405 U. S. 645, 656 (1972).

44. General Meyer also testified that drawing down the strength of support units could "destroy the effectiveness of follow-on combat formations [and] degrade the ability of the base to generate adequate trained manpower from the inductive pool once they come aboard." Hearings on S 2294, at 1817.

Of course, it is in combat service support roles, as distinguished from combat and combat support positions, that women have been most traditionally employed.[45]

Thus, far from a guarantee that any future draft would merely funnel registrants into all-male, close combat assignments, Appellant offers strong reason to believe that most, if not all, foreseeable conscriptions will *not* have that character at all. If a renewed conscription would be confined to men, the reason would not be the all-male "nature" of the *positions* for which conscripts would be needed and to which they would be assigned, but the all-male character of the present pool of *registrants* from which all conscripts would necessarily be drawn. MSSA, § 4(a), 50 U. S. C. APP. § 454(a). If only men will later be drafted, it is likely to be because only men are now being registered. Not even in a military context can the Government be permitted so blatantly to lift itself above constitutional challenge by its own bootstraps.

"[R]egistration is properly regarded as a first step in [*some*] conscription process," App. Br., at 28, but this means only that the Government must justify forcing upon all men, and no women, duties which are burdensome and intrusive in themselves and which expose *all* so burdened, and *none* unburdened, to the possibility of eventual conscription. That registration is properly so regarded does *not* mean, however, that a law discriminating by its terms between men and women at the registration threshold may be deemed justifiable so long as one can imagine *some* valid conscription program which would, in retrospect,

45. Senator Cohen made the same point:

"The requirements for combat soldiers will be high, but so will the requirements for the large numbers of military personnel who fill noncombat roles. What will happen if there are not enough women volunteers to fill those jobs designated for their service? Will we take male draftees who could fill combat positions and place them in non-combat positions and place them in non-combat positions intended for women?" R. 883-84, reprinted at S. Rep. 96-826, at 241.

make the current discrimination appear to have been functionally related to the program that emerged. Speculation on the look of the future cannot be invoked to erase the facial flaws of present law.

C. Military Flexibility Would Be Enhanced by the Registration of Women.

Ultimately the Government argues, as it must, that "the exclusion of women from the draft pool is substantially related to meeting effectively the Nation's emergency military needs."[46] The facts and argument presented at pages 8-23 and 39-46 of the Motion To Affirm set forth the clearly adequate, the indeed "overwhelming evidence",[47] which contradicts the purported combat flexibility justification for all-male registration. Jur. St. 20a-43a.[48]

As is conceded by Appellant, App. Br. at 32, n. 28, the Army fell 5% short of its fiscal 1980 female recruitment quota. The flow of volunteers even in peacetime is irregular and undependable,[49] and there has been a notable failure of the Services to attract expanded numbers of female volunteers in wartime.[50] Therefore, we cannot rely on volunteers to provide the 80,000 female inductees who "would be of overall benefit to the effective-

46. App. Br. at 29; *see, id.* at 29-38.

47. Jur. St. 20a.

48. Appellant criticizes the District Court for "reweighing the evidence" and for substituting its judgment for that of Congress. App. Br. at 37-38. That description does gross injustice to the role actually played by the three-judge court below. The District Court took a closely circumscribed view of its role. In selecting the intermediate standard of review for this gender-based classification over an argument for greater deference to Congress, the District Court conceded that "any judicial deference . . . due the Congress . . . should be extended in the determination of whether the standard is met, . . ." Jur. St. 19a.

49. Motion to Affirm at 10, n. 17.

50. Jur. St. 31a, n. 22, J. A. 111.

ness of a mobilization plan"[51] as and when needed in time of war. *Cf., Alexander v. Louisiana,* 405 U. S. 625, 639 (1972).[52]

Appellant's rhetorical notion that registering, drafting, or giving women important duties in time of war would be an unprecedented experiment,[53] is plainly wrong as a matter of world history and American experience. Registration and conscription of women are not novel experiments in modern society.[54] In World War II, the United Kingdom conscripted into non-combat positions in the armed forces 125,000 women, and registered another 9,600,000 women for possible service.[55] Both Canada and

51. Jur. St. 32a, J. A. 275-276.

52. Appellant now relies upon General Bernard Rogers' testimony on S 2294 that "[t]here is an overstrength * * * in those types of function that our women would be found," as support for the Appellant's argument that drafting, and thus registering, women is unnecessary because "more than sufficient numbers of women have been volunteering to staff those non-combat positions for which they are eligible." App. Br. at 13. However, General Rogers was not describing overall Army recruitment results. He was depicting the situation of peacetime duty assignments in his multi-Service European Command. Hearings on FY 1981 Defense Authorization Bill, S 2294, at 1215-16. Testimony on the point concluded with the question whether he favored the registration of women for the draft, General Rogers replied:

"I have always believed we should, yes, sir."

53. App. Br. at 38, n. 34.

54. Nor was the idea unheard of in ancient times. See Plato, *Laws, Book 7,* from the collected Dialogues of Plato (Hamilton and Cavins eds., 1961) at 1384 ("women must take their share in maneuvering, company drill, and grounding and shouldering of arms").

55. Kenneth J. Coffey, *U. S. Selective Service Manning the U. S. Armed Forces in a Post All Volunteer Era: The Historic Lessons of Conscription in the U. S. and Eight Other Countries.* ("Coffey"), 314-17. This paper was cited and relied upon by the Defense Manpower Commission and its staff. *E.g.,* Bulle, *The Historical Context of the Evolution of Current Manpower Policies,* in I Defense Manpower Commission Staff Studies (1976).

Australia required the registration of women during World War II. *Coffey,* at 320. Both the Germans and Russians drafted women in World War II, and deployed them advantageously in both combat and non-combat positions. *Id.,* at 289-93, 305-11.

In the United States, President Roosevelt submitted to Congress the Nurses Selective Service Act of 1945, proposing the *conscription* of twenty-thousand female nurses. Nurses Selective Service Act of 1943, H. Rep. 194, 79th Cong., 1st Sess. (1945). That Act passed the House of Representatives; and only the end of the war in Europe prevented the enactment of America's first female draft. Nurses For The Armed Forces, S. Rep. 130, 79th Cong., 1st Sess. (1945).

The lack of any consideration of registering women when the MSSA was enacted in 1948 and the Congressional state of mind which led to the reflexive omission of women from consideration are detailed at pages 4 through 6 of the Motion To Affirm. Also uncontested in this case is the fact that, with each periodic revision of the MSSA, in 1951, 1967, 1969, 1971 and 1973, there was no consideration or analysis of the exclusion of women from the draft. J. A. 292-293.[56]

Since 1948, the history of enacted legislation shows Congressional recognition of the suitability of women, in large numbers and over the broadest spectrum of roles, in the military. In 1967, during the Vietnam War, Congress removed the last statutory limitations upon the number or percentage of women in the Armed Forces. 81 Stat. 374, P. L. 90-130. This completed the acknowledgment by

56. Even in 1948, the available evidence supported a two-sex draft. For example, in connection with a different statute:

> "I am convinced that in another war [women] have got to be drafted just like men." General of the Army Dwight D. Eisenhower, Hearings on S 1614 Before The Subcommittee On Organization and Mobilization of the House Committee on Armed Services, 80th Cong., 2d Sess., No. 238 at 5563-64 (1948); see, Motion To Affirm, at 11-12.

Congress that the need for women, in raw numbers and in percentages, would increase "in time of war." S. Rep. 117, 82nd Cong., 1st Sess. 7 (1951); Motion To Affirm, at 12.

In the 1970's, Congress opened the service academies to women, integrated the Women's Army Corps into the Regular Army, and abolished all statutory combat restrictions on women in the Army. Motion To Affirm at 14. Those Acts, plus the consistent support found in funding the increasingly prominent role of women in the military, indicate a longstanding Congressional policy of encouraging the Armed Forces' development of gender-neutral criteria for service, and Congressional confidence in the judgment of the military in accomplishing that goal while enhancing and without ever denigrating the principal objective of providing the most effective and efficient possible defense capability.[57]

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57. At crucial points in his Brief, Appellant relies upon the deposition testimony of "Army Chief of Staff General Edward C. Meyer." App. Br. at 14, 37. General Meyer's deposition was taken on October 19, *1976,* prior to the Army's own field exercise tests, prior to most of its other experience with the expanded utilization of women (J. A. 99-102, R. 1088), and prior to the change in definition of combat in 1977 (J. A. 185-187). General Meyer noted the tentative and personal nature of his opinion in 1976 (J. A. 261, 262) and no similar testimony was elicited from him when he appeared in the FY 1981 Defense Authorization Bill hearings in 1980. Instead, he was Army Chief of Staff when the Services supplied the Defense Department with the goal of 80,000 female accessions in the first six months of a European War. J. A. 275-276.

Similar testimony cited by Appellant, such as that of Lt. General Moore in his October 14, 1976 deposition also must be taken in the context that all service plans for the optimal utilization of women fully consider the assignment and rotation constraints emphasized by Appellant. Jur. St. 42a, n. 31; Deposition of Lt. Gen. Moore, J. A. 252, at 253-54, 257. To the same effect, Appellant invokes Deputy Chief of Staff General Yerks for the combat-intensive nature of possible next wars. App. Br. at 30. But General Yerks was one of those who testified that because of the performance of women in the Army, and the added flexibility which their skills bring to the

On February 11, 1980, pursuant to a Congressional request for advice in P. L. 96-107 (1979),[58] the President recommended the inclusion of women in the MSSA registration pool. (J. A. 29-79). The primary reason for the recommendation was military utility,[59] with "the issue of equity" providing a secondary reason. (J. A. 59-61).

As related in the Motion To Affirm, at 15-18 and 40-45, both military and civilian defense officials testified uniformly in favor of registering women based upon the needs of the Nation and their proven ability to contribute to meeting those needs. Assistant Secretary of Defense, Robert Pirie, expressing the official Defense Department position, testified on March 5, 1980:

> "It is in the interest of national security that, in an emergency requiring the conscription for military service of the Nation's youth, the best qualified people for a wide variety of tasks in our Armed Forces be available. The performance of women in our Armed Forces today strongly supports the conclusion that many of the best qualified people for some military jobs in the 18-26 age category will be women . . . [Those women] should be available for service in the jobs they can do, just as men will be available for jobs they can do." (J. A. 212).

Similarly, while there could be "monumental strains" on training facilities if the law required women to be

57. (Cont'd.)

Army, he "would certainly favor registration of women." Hearings on S 2294, at 1389.

58. R. 259.

59. Hearings on S 2294, at 1854. "However, women can be used in large numbers in the peacetime and wartime force. Their presence could free more men for close combat jobs." J. A. 60. "[C]onsiderations of performance and equity" were presented in that order by Administration witnesses. *E.g.*, Statement of Messrs. Wellford, Rostker and Danzig, R. 867, at 891. Statement of Messrs. Pirie and Rostker, J. A. 209, at 210.

drafted in equal numbers with men, R. 881, it is clear that no such administrative problems would arise if the number of female inductees were set by the Department of Defense following the registration of men and women. J. A. 248, R. 1369-70.

Thus, precisely as required by the District Court, the "military flexibility" rationale for male-only conscription is "contradicted by Congress' own actions [and by] the overwhelming evidence on the record." Jur. St. 20a. There is, very simply, no military need to exclude women from registration because there is no inevitable need to exclude them from conscription. On the contrary, registration of women would plainly enhance military flexibility. Male-only registration is therefore irrational because it obstructs the very goals which it is said to serve.

D. The Statutory History of Congress' 1980 Funding Decisions Cannot Be Used to Support the Gender Classification Enacted in 1948.

The District Court took the Specific Findings of S. Rep. 96-286 as properly before it and found that those purported justifications of all-male registration failed completely to justify such gender discrimination. In according such weight to the 1980 statutory history, the District Court gave Appellant far more than his due. A reason for both the weakness of those justifications and their constitutional irrelevance, is discernible in the history of the Specific Findings and in long-established legal doctrine. The truth is that the arguments now offered to rationalize all-male registration consist entirely of litigation-inspired afterthoughts, none of which in fact occurred to, or was expressed by, the Congress that enacted the MSSA in 1948. Motion to Affirm at 6-8. It is nothing more than such afterthoughts to which Appellant alludes in its repeated references to "the evidence before Congress" supposedly justifying a male-only draft and male-only draft registration. *E.g.*, App. Br. at 10, 12, 13, n. 18, 23 n. 22, 28, 29, 33.

Evidently recognizing the inescapable force of this Court's precedents holding that such after-the-fact rationalizations are constitutionally inadmissible in defending laws classifying by gender,[60] Appellant now seeks to escape his own concession that no Congress prior to 1979 ever so much as *considered* whether to register women. J. A. 292-94, by adopting a curiously revisionist form of legislative history. Unable to rewrite the history of the 1948 law itself, Appellant attempts to rewrite the history of this case by suggesting, for the first time in the course of this litigation, that the law struck down in July 1980 and tested on appeal in this Court was *not* the 1948 law at all.

Appellant's argument is as tortuous as the legislative history which it seeks to amalgamate as its fictional "Military Selective Service Act of 1980." To unravel that argument, it is necessary to recount some of that history. The first piece of Appellant's fiction, H. R. J. Res. 521, merely transferred to Selective Service the funds ultimately used for, among other things, the 1980 registration, and was accompanied by a legislative record deliberately augmented by material chosen to be "helpful rather than hurtful in [this] litigation." J. A. 220-221. The second, P. L. 96-342, was the basic funding Act for all defense activities for 1981, and was actually enacted *after* the judgment below had been handed down. App. Br. at 28, n. 25.

After H. R. J. Res. 521 passed both Houses of Congress, the Senate Armed Services Committee rejected S 2440, the proposal to include women in the MSSA registrant pool, by a vote of 12 to 5. The Committee adopted the Specific Findings of its Subcommittee on which Appel-

60. *See, e.g., Califano v. Wescott*, 443 U. S. 76, 86-88 (1979); *Weinberger v. Wiesenfeld*, 420 U. S. 636, 648 (1975); *Cleveland Board Of Education v. LaFleur*, 414 U. S. 632, 653 (1974) (Powell, J., concurring in result). Even under a "rational basis" test, only "legitimate, articulated" governmental purposes may sustain a statutory discrimination. *San Antonio School District v. Rodriguez*, 411 U. S. 1, 17 (1974). Articulation thirty years after the fact is the same as no articulation at all.

lant so heavily relies. The Committee included those findings in its report on the pending Department of Defense Authorization Bill for FY 1981 (S 2294), S. Rep. No. 96-826, 96th Cong., 2d Sess. 160-61 (1980). On August 18, 1980, after the District Court had invalidated the male-only draft registration provisions of the MSSA, the House-Senate Conference Committee reported out the Defense Authorization Act for FY 1981. The Senate receded from its registration funding transfer provision as unnecessary because such transfer had already been "enacted in another law"—i.e., H. R. J. Res. 521. H. Conf. Rep. No. 96-1222, 96th Cong., 2d Sess. (1980). The House in turn agreed to incorporate the Specific Findings of the Senate Committee. On August 26, 1980, Congress adopted the FY 1981 Defense Authorization Act as P. L. 96-342. Thus, when Congress acted on P. L. 96-342, and when the conferees adopted the Specific Findings, initiated by the Senate Subcommittee in April 1980, they were the Congressional equivalent of *obiter dictum*, totally irrelevant to the enacted legislation.

At no point in this recent sequence of acts and omissions did Congress take a single step to *prevent* the expenditure of funds on the registration of women,[61] even after the decision invalidating male-only registration in

61. In debating H. R. J. Res. 521 in June 1980, the Senate and House each voted down on the floor an amendment that would have forbidden the use of transferred funds for registration in a sexually discriminatory manner. Since the MSSA had not been amended to permit registration of women, such a restriction would have prevented registration entirely. This was the only occasion on which the question of registering women reached the floor of either chamber—in debate over an amendment to a funding-transfer provision, not over any proposal to amend the MSSA itself. As the Senate Armed Services Committee emphasized "[t]he issue of whether women should be registered" is secondary to and only "confus[es] the real military issues—*i.e.*, the urgent need to reinstitute *some* draft registration. S. Rep. No. 96-826 at 157. The floor amend-

the District Court in this litigation, of which Congress had long been aware.[62]

The most one can accurately say is that Congress in 1980 "declined to require the registration of women." App. Br. at 6 (fn. omitted). Plainly stated, the Congress of 1980 left undisturbed what the Congress of 1948 had done. Such inaction is surely a far cry from an amendment which reenacts the old law based upon new and explicit reasons—despite Appellant's effort to blur the distinction. App. Br., at 28 n. 25.

In any event, it is settled that appropriations legislation does not amend, repeal or otherwise affect previously enacted substantive law, *TVA v. Hill,* 437 U. S. at 190, and that matters inserted into the Congressional history of funding legislation are irrelevant to the proper interpretation of prior substantive law. *Id.,* at 191-93.

In this case, reference to subsequent funding legislation is singularly inappropriate because H. R. J. Res. 521 was emergency legislation, as to which female registration was considered not on its merits, but as a threat to registration itself. 126 Cong. Rec., S 1242 (2/7/80) (Senator Heflin).[63]

"It is most significant that both houses of Congress must concur in the enactment of positive law that alters individuals' substantive rights. U. S. Const., art. I, § 7." *Chada v. INS,* Slip Op., at 42 (No. 77-1702) (CA 9 12/22/80), "The Article I authorization to make law does not

61. (Cont'd.)

ments to the funding transfer were widely perceived as efforts to block registration altogether.

62. Motion to Affirm at 6-8.

63. In 1979 the committee reported a bill (S 109) mandating peacetime registration of males. President Carter, in his State of the Union Address in January 1980, recognized the need for registration to improve our defense posture. This issue of whether women should be registered became a dominant part of this discussion, confusing the real military issues. S. Rep. 96-826 at 157.

permit positive law which alters the substantive legal rights of individuals to be enacted by a mere executive recommendation, . . . followed by legislative inaction—an inaction that could equally imply endorsement, acquiescence, passivity, indecision, or indifference." *Id.*, at 43.[64]

CONCLUSION

When it told women in 1948 that the Nation's defense was a mission for men only, Congress unthinkingly belittled half our people—and unfairly burdened the other half with the certainty of the regimentation and compulsion of registration, the appreciable likelihood of conscripted service, and a not insubstantial risk of coerced combat, to all of which only young men would be exposed. The line which Congress drew, reflexively and not for any considered reason, did not distinguish the combat-capable from those incapable of combat, the militarily useful from those unable to contribute to the defense effort, or otherwise separate the Nation's youth into two groups on some neutral basis arguably closely related to any important governmental purpose. Section 3 of the MSSA simply and starkly divided our daughters from our sons—and does so

64. In another context, Thomas Reed Powell wrote: "Now Congress has a wonderful power that only judges and lawyers know about. Congress has a power to keep silent. . . . Of course when Congress keeps silent, it takes an expert to know what it means. But the judges are experts. They say that Congress by keeping silent sometimes means that it is keeping silent and sometimes means that it is speaking." *The Still Small Voice of the Commerce Clause*, Proceedings National Tax Association 337, 338-39 (1937), in 3 Selected Essays on Constitutional Law 931, 932 (1938). Even if judicial reliance upon Congress' silence in upholding certain exercises of state power under the Commerce Clause is entirely defensible, judicial reliance upon Congress' silence to support federal legislation otherwise violative of the Fifth Amendment is surely not.

to this day on a matter vital to both and on the basis of sex alone.

The District Court properly found Section 3 insubtantially linked to any legitimate objective and, indeed, found it to be altogether irrational and contrary to the very interests which it purports to further. Nothing about this case warrants a lower standard of review than that applicable to gender classifications generally; and the absolute and arbitrary use of gender to sort out fundamental civic obligations is insufficient not only under heightened scrutiny, but under the most minimal scrutiny as well.

The judgment of the District Court should be affirmed.

Respectfully submitted,

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